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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 838

FRED R. DICKSON, Warden of the State Prison at San Quentin, California,
Petitioner,

vs:

CHARLEY LUTHER PIKE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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OPINION BELOW

The opinion of the Court of Appeals is as yet unreported and a copy is appended hereto as Appendix A. The order of the United States District Court is unreported and a copy is appended to this petition as Appendix B. The opinion of the Supreme Court of California is reported in 58 Cal.2d 70, 22 Cal.Rptr. 654, 372 P.2d 556, and a copy of that opinion is appended to this petition as Appendix C.

JURISDICTION

On October 18, 1963, the United States Court of Appeals for the Ninth Circuit reversed an order of the United States District Court for the Northern District of California, Southern Division, denying Charley Luther Pike's petition for a writ of habeas corpus. On November 22, 1963, a petition for rehearing *en banc* was denied. Petitioner, appellee below, invokes the jurisdiction of this Court under title 28, U.S.C. section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that a petition for habeas corpus by a state prisoner alleging nothing more than that the prosecutor asked improper questions on his voir dire of prospective jurors and that he argued improper matters in his summation, stated grounds for relief.

2. Whether the Court of Appeals erred in articulating the following standard to be applied by the federal courts in reviewing state convictions: That the judgment must be set aside whenever there are errors so "egregious" as to affect the fairness of a jury's consideration of the case.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

Charley Luther Pike, petitioner below, along with Richard Ceniceros, his co-defendant, were charged by information filed in the Superior Court of Los An-

geles County with the murder of Richard D. Kent. Pike was charged in a second count with armed robbery. Both defendants were found guilty by a jury, and after a trial before the same jury on the issue of penalty, Pike was sentenced to death, Ceniceros to life imprisonment.

On automatic appeal to the Supreme Court of California, Pike raised numerous contentions of error, among them an assertion that the prosecuting attorney was guilty of misconduct on his voir dire examination of prospective jurors, and that he was guilty of further misconduct in arguing improper matters in his summation to the jury at the trial on the issue of penalty. On June 27, 1962, the California Supreme Court affirmed the conviction and sentence in *People v. Pike, supra,* Appendix C. The opinion exhaustively considered Pike's specifications of error, including those respecting prosecution misconduct, set out representative samples of the record upon which the contentions of misconduct were based, and determined that on the basis of well established authority and the record itself the prosecuting attorney was not guilty of misconduct except in one minor respect, which was not prejudicial to Pike. A petition for rehearing was denied on July 7, 1962, and a petition for certiorari was denied on December 17, 1962. *Pike v. California,* 371 U.S. 941.

B. Proceedings in the federal courts.

On January 22, 1963, Pike filed an application in the United States District Court for the Northern

District of California, Southern Division, for a writ of habeas corpus. The grounds urged in support of petitioner's application were misconduct of the district attorney in his voir dire examination and in his argument on the issue of penalty. Petitioner asserted that these errors had deprived him of a fair trial.

On January 24, 1963, the District Court entered its order denying the petition. Appendix B. The order recites:

> "The petition herein for writ of habeas corpus (including its prayer for an order to show cause why the petition for writ of habeas corpus should not be granted) and the petitioner's application for stay of execution, together with petitioner's accompanying Memorandum Of Points And Authorities have been carefully examined and considered. They have been found to be without merit in justifying the relief sought."

The order further stated that the matters urged on petitioner's application had been fully considered by the Supreme Court of California, which Court had reached the same conclusion. It also noted this Court's denial of certiorari.

On January 28, 1963, the Honorable Frederick Hamley, Judge of the United States Court of Appeals for the Ninth Circuit, on petitioner's application, issued a stay of execution and granted a certificate of probable cause.

On January 29, 1963, petitioner filed his notice of appeal from the order of the District Court denying the petition for habeas corpus filed January 24, 1963,

and the order denying the certificate of probable cause filed January 28, 1963. Leave to appeal in forma pauperis was granted by the District Court and counsel was appointed to represent petitioner by the Court of Appeals.

On October 18, 1963, the Court of Appeals for the Ninth Circuit reversed the District Court's denial of Pike's petition, and on November 22, 1963, a petition for rehearing *en banc* was denied.

C. Statement of the facts.

The details of the substantive crimes of which Pike and his co-defendant were convicted are not at issue here. They are set out in considerable detail in the opinion of the Supreme Court of California, Appendix C. It is sufficient to note that the evidence established beyond reasonable doubt that Pike, during the commission of an armed robbery, murdered a policeman when the latter tried to apprehend him.

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. THE COURT OF APPEALS ERRED IN HOLDING THAT PIKE'S ALLEGATIONS OF PROSECUTION MISCONDUCT STATED GROUNDS FOR RELIEF ON FEDERAL HABEAS CORPUS.

This case poses the question of whether the writ of habeas corpus should be turned into the common law writ of error. The Court of Appeals has apparently concluded that it should, holding that allegations respecting questions asked on voir dire examination and the proper scope of argument are matters which

may be raised on a petition for habeas corpus and which must be considered by the District Court. This is a novel and remarkable decision in the light of numerous opinions of this Court on the subject.

This Court has repeatedly declared that habeas corpus is not a form of appellate review and lies only where a substantial federal right has been infringed. Thus, in *Townsend v. Sain,* 372 U.S. 293, at 311, (1963) this Court declared:

> "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegations. State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution."

See also:

Hill v. United States, 368 U.S. 424, 428 (1962).

Measured against the standard enunciated by this Court, Pike's petition to the District Court was clearly insufficient and, contrary to the statement of the Court of Appeals, could not have been amended to state grounds for relief in a federal forum. This Court has declared that allegations respecting misconduct on the part of the District Attorney amount to no more than the recital of mere errors of law in a state crim-

inal trial. They do not even raise a federal question on *certiorari*, let alone furnish grounds for extraordinary review on habeas corpus. *Buchalter v. New York*, 319 U.S. 427, 431 (1942); *Lisenba v. California*, 314 U.S. 219, 226-229 (1941). The Court of Appeals dismissed these cases, holding that the allegation of any error in the course of the trial which might affect the jury's consideration of the case might be inquired into on federal habeas corpus. No authority was cited for this novel proposition except *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). *Irvin*, of course, did not deal with the questions here presented, but, rather, involved the inability to obtain an unbiased jury by reason of extensive pre-trial publicity. Neither *Irvin* nor any other federal case holds that a state conviction may be set aside in a federal forum by reason of the grounds alleged here.

It is respectfully submitted that this Court should review the action of the Court of Appeals in departing from the well-established principle of *Buchalter* and *Lisenba*.

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2. THE COURT OF APPEALS ERRED IN ANNOUNCING A NEW STANDARD FOR REVIEW OF STATE CONVICTIONS ON FEDERAL HABEAS CORPUS, NAMELY, THAT ANY ERROR SO "EGREGIOUS" AS TO AFFECT THE FAIRNESS OF THE JURY'S CONSIDERATION OF THE CASE MUST RESULT IN THE GRANTING OF THE WRIT.

Prior to the opinion announced in the Court of Appeals, it had always been the rule that only the gravest allegations respecting detention in violation

of fundamental liberty were cognizable on habeas corpus. *Townsend v. Sain, supra.* The Court of Appeals, however, has blithely announced a new test: Whether the alleged error was so "egregious as to affect the jury's consideration of the case." Under this approach, any incident at trial, which might possibly be error on appeal, is a ground for habeas corpus, and the federal courts become appellate tribunals open to every prisoner who can allege that an error occurred at the trial and intone the magical incantation that such error deprived him of due process of law. With such minimal allegations, every prisoner can compel a federal district court to review the record of his state criminal trial.

As this Court observed in *Douglas v. California,* 372 U.S. 353 (1963), the State of California has established an expensive and complex system for the handling of criminal appeals. A summary notice of appeal from a conviction is sufficient to set the machinery in process. Every appellant in a criminal case receives a free transcript of the proceedings at trial. On request, an attorney is appointed to represent him and briefs are filed by both parties. Ordinary felony cases are heard by the three judge district courts of appeal, and death cases are automatically reviewed by the seven members of the California Supreme Court. In the review of the record, the justices of the respective courts are assisted by a retinue of attaches and law clerks, not unlike the staff of this Court. After briefing of the legal issues by counsel and independent review by the Court, the case is argued. A

written opinion is then prepared which ordinarily considers all of the issues raised within the broad and liberal rules governing appellate review in this State. Only after affirmance does a conviction become final.

If the opinion of this Court requires a federal district judge to read the record in every California criminal case wherein a prisoner makes an assertion of error, then it is difficult to justify the continuance of this expensive and elaborate system of appellate review which now prevails in this State. Heretofore, the federal courts have exercised their proper and constitutional function of protecting and enforcing basic federal constitutional rights in cases where state convictions were brought about by a coerced confession or the proceedings infected by the denial of counsel or by local prejudice, or a jury selected in such a manner as to discriminate against a class of citizens. See *Fay v. Noia,* 372 U.S. 391, 413-414 (1963). Never, to our knowledge, has a federal court asserted jurisdiction to review state criminal convictions for any "error" in the record and if that error is found to be "egregious," then to set aside the conviction. We respectfully submit that it was never the intention of Congress to vest in the federal courts the power of general appellate review over state criminal convictions.

Moreover, the opinion does not make clear, even by its own terms, what law is referred to for the determination of whether there is "error." May a federal district judge refer to the state law, or must he refer to federal procedural law, or perhaps, to some

unknown mixture or combination of the two. It might be noted that California law provides that no judgment of conviction shall be set aside unless the appellate court is of the opinion that a miscarriage of justice has resulted. California Constitution, Art. VI, § 4½. Is this the standard to be applied by the federal courts? If so, then the court of appeals is requiring the district court to repeat the precise function performed by the State of California.

CONCLUSION

We respectfully submit that for the foregoing reasons, a writ of certiorari should be granted by this Honorable Court.

Dated, San Francisco, California,
January 24, 1964.

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(Appendices A, B and C Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Charley Luther Pike, Appellant, vs. Fred R. Dickson, Warden, California State Prison, San Quentin, California, Appellee.	No. 18,470 Oct. 18, 1963

On Appeal from Order Denying Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of California.

Before Pope, Hamley and Duniway, Circuit Judges.

Pope, Circuit Judge.

The appellant Charley Luther Pike, convicted of first degree murder in a California Superior Court and sentenced to death, filed in the court below his petition for writ of habeas corpus alleging that his sentence of death was the result of proceedings in the State court which had denied him due process of law. No question is raised as to the appellant having exhausted his State remedies in the light of the decision in Fay v. Noia, 372 U.S. 391.

The petitioner filed his petition in the court below in propria persona and he was granted leave to proceed in forma pauperis. The petition, although couched in good English, is an inexpertly drawn legal document. Petitioner stated that he was not versed in the law and that his education did not go beyond the seventh grade.

In view of these circumstances it is appropriate that the petition be read in the manner suggested by Chief Judge Sobeloff in United States v. Glass, 4 cir., 317 F. 2d 200, 202, as follows: "Where the layman's papers clearly show what he is driving at, it is usually in the interest of justice and may in the long run save time to temper the reading of the papers with a measure of tolerance." This court has applied the same rule of construction of a layman's pleadings in Thomas v. Teets, 9 cir., 205 F. 2d 236, 238.[1]

Pike's petition complains of the conduct of the prosecuting attorney at his trial in two respects. The first complaint has to do with the prosecuting attorney's mode of questioning prospective jurors on their *voir dire* examination with respect to their willingness to join the other jurors in bringing in a verdict of death. He then alleges that what he asserts to have been an unfair method of questioning jurors was followed in the final argument of the prosecutor by an

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[1] "Thomas' application being drawn by an inexperienced layman is to be construed to give its allegations effect, though inartificially drawn. Darr v. Burford, 339 U.S. 200, 203, . . .; Price v. Johnston, 334 U.S. 266, 292, ..."

improper emphasis upon the answers given on *voir dire*. The petition's allegations in this respect are set forth in the margin.[2]

The second respect in which petitioner attempts to allege a denial of fair trial relates to a part of what is asserted to have been a portion of the closing argument of the prosecutor to the jury. The allegation is that the remarks of the prosecutor to the jury operated to deprive petitioner of the right to effective aid of counsel and to deny him a fair trial. This portion of the petition is set forth in the margin.[3]

What the petitioner was attempting to claim was that the way the prosecutor interrogated the jurors as

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[2]"IX—At the outset of the trial, the District Attorney, on voir dire examination, made sure that the jury finally selected would bring in the death penalty against petitioner. He told the prospective jurors that:

(a) He wanted assurance that each juror would join the other jurors in giving the death penalty to petitioner;

(b) He was more mature and experienced than the individual jurors, and in the light of that experience he was demanding the death penalty at this early stage of the proceedings.

(c) Prospective jurors already examined and seated in the jury box had appeared to commit themselves to voting for the death penalty. Would the juror now being questioned be willing to join the others in bringing in a verdict of death?

X—In his closing arguments, both on the guilt and penalty phases, the District Attorney told the jury:

(a) They had been advised on *voir dire* that he would demand the death penalty and they had assented to it.

(b) His office requires him to be fair, honest and just. His interest in justice and fairness compelled him to demand the death penalty.

(c) The death penalty would not deter criminals as vicious as petitioner, but it did deter others."

[3]"In the District Attorney's closing arguments to the jury petitioner was deprived of the right to effective aid of counsel and the

to their attitudes toward the imposition of the death penalty, and the prosecutor's closing remarks to the jury were so extremely prejudicial to the rights of the petitioner that they operated to deny him a fair trial and to deprive him of due process of law. It is noted also that the petitioner challenges as incorrect or inaccurate the California Supreme Court's account of what transpired at the trial.

When this petition, which prayed for an order to show cause why the petition should not be granted, was presented to the trial judge, the Judge made an order simply reciting that he had carefully examined and considered the petition and found it without merit. The court then added "It is to be noted that the matters urged upon this court have been fully

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right to a fair trial by the reprehensible blow administered by the prosecution:

(1) He stated to the jury that the Public Defender could and would knowingly and ethically permit petitioner to commit perjury;

(2) Petitioner's story was made out of "wholecloth" and the Public Defender could not be believed because it was his duty to permit petitioner to lie.

With respect to this the California State Supreme Court said that the District Attorney's conduct was '. . . not to be condoned' (People v. Pike, supra). However, the Court felt that the argument was made in response to a statement made by the Public Defender. The record will disclose that the Public Defender did make a short statement, but the District Attorney's argument covering several pages can scarcely be said to be justifiable reply. Moreover, petitioner had a constitutional right to effective aid of counsel.

It is submitted that this conduct by the prosecutor and the trial Court, taken together with the other occurrences referred to, constitutes a denial of a fair trial, at least on the penalty phase, to petitioner; a deprivation of his liberty without due process of law, and, if the petitioner is executed, will result in a deprivation of his life—all contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States."

considered by the Supreme Court of the State of California in People v. Pike, 58 A.C. 69, . . . which Court reached the same conclusion. It is to be noted that certiorari was denied by the Supreme Court of the United States." (See People v. Pike, 58 Cal. 2d 70, 22 Cal. Rptr. 664, 372 P. 2d 656.) Accordingly the petition for writ of habeas corpus was denied and dismissed.

At the outset it is to be noted that the procedure adopted by the trial court was inadequate. Assuming, as we do, that the petition failed completely or adequately to set forth a claim, yet it is entirely clear that the petition was susceptible to amendment. The settled rule with respect to a pleading which is inexpertly drawn and fails to set forth facts in a proper manner was stated authoritatively in Conley v. Gibson, 355 U.S. 41, 45-48, as follows: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive of the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[3a]

[3a]Conley v. Gibson was a civil action; the same rules relating to amendments apply to habeas corpus applications. Title 28, U.S.C. §2242. See Price v. Johnston, 334 U.S. 266, 291, and Egan v. Teets, 9 cir., 251 F.2d 571, 577.

Far from affording any opportunity for an amendment of the petition, the court proceeded to pass upon its merits upon the basis of the decision of the Supreme Court of California rendered upon Pike's mandatory appeal. It is plain that petitioner had the right to challenge the State Supreme Court's version of the facts about the mode of his trial.

With all of its ineptitude the petition was plainly aimed at making two points: the first, a question of fact, was its assertion that what happened at petitioner's trial was not as recited in the opinion of the California Supreme Court but rather as set forth in the petition; the second, was that the misconduct of the prosecutor alleged in the petition was so egregious as to deny the petitioner a fair trial, which is another way of saying that he was deprived of due process of law.

The clear impropriety of relying upon a State Supreme Court's decision as a conclusive determination of questions of this kind is too well settled to require argument. Jennings v. Ragen, 358 U.S. 276, is a case almost precisely in point. There petitioner claimed denial of constitutional rights through the interjection in the evidence of a confession which he alleged was coerced through physical mistreatment. The district court dismissed the application without a hearing. The Supreme Court noted that the district court in dismissing the application "simply relied on the facts and conclusions stated in the opinion of the Supreme Court of Illinois." This was held to be error and that dismissal by the district court should not have taken place without that court "first satisf g

itself by an appropriate examination of the State court record, that this was a proper case for the dismissal of petitioner's application without a hearing in accordance with the principle set forth in Brown v. Allen, 344 U.S. 433, 463-465, 506."

The reason why a State court's adjudication of the facts relating to a claim of denial of constitutional right cannot be final or binding upon a federal court in a habeas corpus proceeding was noted in Brown v. Allen, supra, at p. 500, as follows: "But the prior State determination of a claim under the United States Constitution cannot foreclose consideration here of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have. . . ."

This court had occasion to discuss that proposition in Cranor v. Gonzales, 9 cir., 226 F. 2d 83 at p. 93.

Another question, one of law, is whether the actual conduct of the prosecutor at petitioner's trial was sufficiently prejudicial so as to prevent a fair trial.

Here again the federal court is not bound by the State court's conclusion that the conduct was not prejudicial. In Chavez v. Dickson, 9 cir., 280 F. 2d 727, 737, this court had occasion to say upon this point: "A question of law is presented as to whether the trial court error was so prejudicial as to deprive Bates of due process of law. As to this the federal district court was not bound by the state court conclusion that the error was not prejudicial."

The contention of the appellee Warden here is that the asserted misconduct on the part of the district

attorney would amount to no more than recital of mere errors of law in a state criminal trial. It is said that this does not raise a federal question and hence there would be no basis for federal habeas corpus relief, citing Buchalter v. New York, 319 U.S. 427, 431, and Lisenba v. California, 314 U.S. 219, 226 to 229. This, we think, overlooks the strong current of present judicial authority respecting the sort of errors which are so serious as to amount to a denial of a fair trial and of due process of law.

It may be conceded that a mere error committed in the course of a trial would not, under ordinary circumstances, be deemed so fundamental as to measure up to a deprivation of due process; but as always, circumstances alter cases, and the presently recognized rule appears to be that errors which operate to affect the fairness of a jury's consideration of a case may be so egregious as to amount to a denial of a fair trial. The test to be applied in determining whether errors are so egregious was stated by us in Chavez v. Dickson, supra, as follows: (280 F. 2d at 735) "It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and that federal court interference is warranted," citing Lisenba v. California, supra. And see cases cited in our footnote to that statement.

Illustrating the application of such test is Irvin v. Dowd, 366 U.S. 717, 722. In that case complaint was made of the failure of the state trial court to grant a

second change of venue after a showing by the accused of extensive and widespread newspaper and other publicity calculated to create an advance opinion as to the accused's guilt in prospective jurors in the area where the crime was committed and where the accused was brought to trial. The Court said: "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." 366 U.S. 722.[4]

The conduct of the prosecutor at the trial, attempted to be described in the petition, could possibly, amount to a denial of due process. Before we can answer the question as to the petitioner's right to the writ we would have to know first, exactly what happened at the trial, in the respects mentioned, and second, precisely what did the prosecutor do and say; and then we would have to determine and conclude

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[4]Unquestionably in most cases failure to grant a change of venue raises only a question of state procedural law, and the party denied the change of venue can claim no more than reversible error. But in certain cases denial of a change of venue may result in a trial "in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended." Illustrations of this, in addition to Irvin v. Dowd, supra, are Rideau v. Louisiana, 373 U.S. 723, and United States v. Denno, 2 cir., 313 F.2d 364.

That an impartial jury is an essential to a "fair and impartial trial" and to meet the requirement of due process is discussed generally in Baker v. Hudspeth, 10 cir., 129 F.2d 779, 781-782. A recent case, applying the same rule, is Lane v. Warden, 4 cir., 320 F.2d 179. (We do not find occasion here to indicate whether we would approve the result reached in that case, upon its facts.)

whether that conduct was so egregiously prejudicial as to deny the petitioner a fair trial.

The error on the part of the court below was in its failure to inquire into the facts so as to ascertain whether there was in fact prejudice and then whether that prejudice was so serious that it amounted to a denial of due process.

It must be conceded that the trial court, upon examination of the petition, and comparing it with the statements of the California Supreme Court concerning what the record shows transpired at petitioner's trial, would be justified in feeling that the petition is probably untrue. The district judge was aware, as are we, of the California court's leadership in protecting the rights of persons accused of crime, as well as of California's "forward treatment of indigents."[5] But such a feeling does not warrant a summary dismissal of such a petition. What too often happens in such cases is described in the dissenting opinion in Simpson v. Teets, 9 cir., 239 F.2d 890, at 894-895, (decision reversed at 353 U.S. 926), where it was said: "The feeling, supported by the statistics, that the chances are 740 to 1 that such an application is without merit, the knowledge that it may even be a contrived invention, should not deter any judge from shouldering this burden of combing the facts in every such case upon the chance that it may be one of those 13/100ths of 1 per cent that may have some merit. Granting that these applications, all taken together,

[5]For example, see People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905. The quotation is from Douglas v. California, 372 U.S. 353, 355.

present a task for the courts that is hard to bear, yet it is a proud tradition of our system that every man, no matter who he may be, claiming denial of due process is entitled to have that claim examined. Making this examination, doing this combing at the earliest possible stage in the litigation may well help ameliorate this serious condition in the federal courts."[6]

Upon remand of this case to the trial court the latter's task would obviously be a simple one. There appears to be no question as to the accuracy of the State court record.[7] All that would be needed to ascertain the actual facts would be for the district judge to do what was required in Jennings v. Ragen, supra, that is to say, make an appropriate examination of the State court record. Should the court be of the view that the petition requires amendment, permission to make such an amendment should be granted.

We note that the California Supreme Court's opinion does not set out the voir dire examination of jurors in full. It gives what it calls a "representative sample". Upon remand the district judge will have an opportunity to read the examination at length and in its entirety; and he may then determine and apprise, for himself, whether the prosecutor's proce-

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[6]Cf. Walker Distributing Company v. Lucky Lager Brewing Company, ... F.2d ..... (Sept. 6, 1963) where, speaking of the possibility that a complaint is a sham, or a "strike suit" we said: "One cannot know about such matters by a mere examination of pleadings."

[7]In Chavez v. Dickson, supra, the accuracy of a certain transcribed statement was challenged by the petitioner and we held that it was there the duty of the district judge to call for records from which this was made and to ascertain for himself the accuracy of the transcription.

dures were so prejudicial as to effect a denial of a fair trial.

That same opinion contains a statement as follows: "Finally, it is observed that neither defendant made timely objection to the subject statements and questions of the deputy district attorney, and hence they 'cannot now complain for the first time as, upon objection, any danger that the jury might have misunderstood their duty could have been corrected by proper instructions.' " (58 Cal. 2d at 88.) We cannot say at this time whether upon remand the trial court may be faced with the problem here mentioned. If the trial court finds that the record of petitioner's trial does not bear out his allegations, then that will put an end to this proceeding. The court may never have occasion to decide whether there was a failure to object as stated in the Supreme Court's opinion, or whether such a failure to object would constitute a bar to federal habeas corpus. For that reason we find no occasion at this time to rule upon the question whether any such failure to object, in the circumstances of this case, constitutes in itself a bar to the relief sought by petitioner.[8]

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

(Endorsed) Opinion Filed Oct. 18, 1963.

Frank H. Schmid, Clerk.

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[8]To deal with that matter would require a study as to what bearing the case of Fay v. Noia, supra, has upon such a situation.

Appendix B

In the United States District Court for the Northern District of California Southern Division

No. 41,256

In the Matter of the Petition of Charley Luther Pike for a writ of Habeas Corpus.

ORDER DENYING (1) PETITION FOR ORDER TO SHOW CAUSE WHY PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED (2) PETITION FOR WRIT OF HABEAS CORPUS AND (3) APPLICATION FOR STAY OF EXECUTION

Petitioner's motion for leave to proceed in *forma pauperis* has been granted by separate order.

The petition herein for writ of habeas corpus (including its prayer for an order to show cause why the petition for writ of habeas corpus should not be granted) and the petitioner's application for stay of execution, together with petitioner's accompanying Memorandum Of Points And Authorities have been carefully examined and considered. They have been found to be without merit in justifying the relief sought. It is to be noted that the matters urged upon

this court have been fully considered by the Supreme Court of the State of California in *People v. Pike*, 58 A.C. 69, (June 27, 1962; rehearing denied July 27, 1962), which court reached the same conclusion. It is also to be noted that certiorari was denied by the Supreme Court of the United States (83 S.Ct. 324, December 17, 1962).

The petition for the order to show cause is hereby denied as is the application for a stay of execution. The petition for a writ of habeas corpus is hereby denied and dismissed.

Dated: January 24, 1963.

Stanley A. Weigel, Judge

Original Filed January 24, 1963,
Clerk, U. S. District Court, San Francisco.

Appendix C

In the Supreme Court of the State of California

In Bank

Criminal No. 7039.

The People of the State of California,
Plaintiff and Respondent,
vs.
Charley Luther Pike and Richard D. Ceniceros,
Defendants and Appellants.

Opinion

By jury verdicts defendants Pike and Ceniceros were found guilty of first degree murder, and Pike was also found guilty of armed robbery. On the murder count the jury fixed the penalty at life imprisonment as to Ceniceros and at death as to Pike. Defendants appeal from the judgments[1] rendered accordingly and from orders denying their motions for new trial and Pike's motion to reduce the penalty to life im-

[1]On the robbery count Pike was sentenced to state prison for the term prescribed by law.

prisonment. The appeal by Pike is automatic. (Pen. Code, § 1239, subd. (b).)

As will hereinafter be shown, Pike took the stand and in effect made a judicial confession of his guilt of the crimes with which he is charged, and the evidence amply supports the judgment of conviction as to Ceniceros. Defendants contend that they were deprived of a fair trial by reason of a variety of asserted errors, relating principally to the denial of Ceniceros' motion for severance, the *voir dire* examination of prospective jurors, the failure to charge a conspiracy, the admission of evidence of other offenses at various stages of the trial, the scope of cross-examination, the introduction of documentary evidence of a prior conviction, and alleged misconduct of the deputy district attorney in argument on the penalty phase. In the light of the whole record we have concluded that the defendants' contentions are without merit, that there was no denial of a fair trial or due process of law, and hence that the judgments should be affirmed.

By information both defendants were charged in Count I with the murder of Richard D. Kent on December 8, 1960. In Count II Pike was charged with armed robbery of Berta and Rudolph Fleischner on December 6, 1960. The information further charged Ceniceros with a prior burglary conviction and Pike with a prior conviction of attempted robbery (in Minnesota). Defendants' motions to set aside the information (Pen. Code, § 995) were denied, and each entered a plea of not guilty. Before the jury were empanelled each defendant admitted the alleged prior conviction.

Ceniceros then moved to strike Count II of the information (armed robbery by Pike) or, in the alternative, to grant a severance. The motion was denied and the case proceeded to trial.

The evidence as to Count I (murder) may be summarized as follows: On the evening of December 8, 1960, Jess Arriola, manager of the Lucky Auto Supply store at 8656 South Broadway, Los Angeles, was working in his store with two salesmen, Wiley Pickett and Sylvester Hnorey. Some time between 8:15 and 8:30 p.m., Pike entered the store and was asked by Pickett if he could help him. Pike drew a gun and told Pickett to open the cash register. The latter was unable to do so and Pike threatened to shoot him. Arriola then opened the register and, under orders of Pike, began putting money into a paper bag.

Meanwhile, Los Angeles Police Officers Kent and Poor had parked their car near the store, unaware of the robbery being committed inside. While Officer Poor remained in the car Officer Kent went into the store to buy new batteries for his flashlight. As he entered he called a greeting to Arriola, whom he knew, and walked towards the four men carrying his flashlight. Pike, who had his back to the entrance, then turned to face Officer Kent and ordered him at gun point to move around a display table. Officer Kent was not in uniform, but his coat was open and Arriola and the others could see handcuffs and ammunition on his belt as he walked. Almost immediately after Officer Kent reached the place where he had been ordered to go, Arriola heard a shot from Pike's direction and

saw Officer Kent clutch his chest and begin to fall, drawing a gun as he did so. Arriola and his two employes ducked down behind the counter and heard a series of shots from Officer Kent's direction. They looked up and saw Pike running toward the front door. Officer Kent staggered after him, then fell to the floor.

Officer Poor, sitting outside in the police car, heard the shots and saw Pike run out of the store, gun in hand. The officer gave chase on foot, calling out, "Police officer, stop." Pike did not stop, and Officer Poor drew his gun and pursued him, pausing to fire a shot during the chase. Pike staggered momentarily, then ran to one of two cars parked near an alley and got into it. The Officer shouted, "Get out with your hands up or I will shoot." At that point Ceniceros jumped out of the car with his hands up, saying, "Don't shoot. That crazy guy got in my car with a gun." Officer Poor ordered him to lie down in the street, then saw Pike pointing a gun at him over the top of the car. The officer dived behind the other car, hearing gunfire from Pike's direction, then saw that Pike's gun had jammed and called to him to drop it. Pike threw his gun down and surrendered. He had a minor gunshot wound in the left shoulder, for which he was subsequently treated.

After Officer Poor had handcuffed the defendants together he asked Pike, "Did you shoot that other Policeman?" Pike replied that "he possibly did but he didn't mean to." Upon their return to the Lucky store Pike was identified by Arriola as the man who

had shot Officer Kent during the attempted robbery. Arriola did not identify Ceniceros at the time, but at the police station that evening he recalled that Ceniceros had been "in my store looking around" either two nights before or the night before the robbery; and that when Arriola had inquired if he could help him, Ceniceros had asked for an item that was not in the store and then had left.

An autopsy established the cause of Officer Kent's death as a gunshot wound of the chest resulting in massive intrathoracic hemorrhage. A ballistics expert testified that the fatal bullet, recovered from the officer's body, had been fired from Pike's gun.

It was the prosecution's theory with respect to Ceniceros' involvement in the crime that the attempted robbery was committed pursuant to a conspiracy between the two defendants to commit such robberies, and further that Ceniceros aided and abetted Pike in the commission thereof by "casing" each establishment before it was robbed. In support of this theory the following evidence was introduced:

As Officer Poor was returning to the Lucky store with the defendants in handcuffs, Ceniceros repeated to him that "the man had got into his car with a gun and he (Ceniceros) had not had anything to do with anything." At the police station later that night Ceniceros was asked by Officer Chiquet if he was acquainted with Pike; he replied that he was not, and that he had never seen him prior to that occasion. In response to further questioning Ceniceros said, "I told you before, this is the first time I've seen him," and

"Why should I cop out to something that would send me to the gas chamber?" An overwhelming mass of evidence was adduced to show the falsity of Ceniceros' assertions in this respect.

To begin with, police officers examining Ceniceros' car, a faded blue Chrysler, discovered a billfold in the sun visor over the driver's seat containing a California driver's license in Pike's name, two Social Security cards in Pike's name, and three wads of folded banknotes. Also, discovered was a sales slip from a store called Sy Devore's, made out to one "Charles Clark" and dated December 8, 1960. Under the carpet on the driver's side the police found 42 one-dollar bills, a ten-dollar bill and a five-dollar bill; under the front seat on the passenger's side the police found a holster that appeared to have been cut down to carry a small automatic weapon, and a jar containing a chalky liquid; on the floor at the right rear the police found, in an envelope marked "Naomi," a small red box containing 12 "findings"—i.e., metal clips used by jewelers to mount stones or other ornaments as earrings (People's Exhibit 67). Fingerprints of both defendants were subsequently discovered on the jar of chalky liquid.

Robert Wiggin, a garage owner, testified that on December 2, 1960, Ceniceros introduced Pike to him as "a friend"; that Pike then left his car with Wiggin to be repaired, and drove away with Ceniceros in the latter's Chrysler; and that Pike's car remained at the garage through December 8, the night of the homicide. Louise Adatto, an apartment house manager,

testified that on November 25, 1960, she rented an apartment to Pike, who gave his name as "Clark"; that Ceniceros helped Pike move into the apartment with a woman and a small child; that she (Mrs. Adatto) thereafter saw Pike and Ceniceros go out together most evenings; and that between 5 and 6 p.m. on December 8, 1960, she observed Pike meet Ceniceros in the driveway and leave in the latter's car.

Lillian Sanchez testified that she met Pike in October 1960, and that he began living with her and her daughter. She first met Ceniceros in October when he came to call on Pike at her apartment. Ceniceros returned on two other occasions during the last two weeks of October, and each time he and Pike would go behind the building and talk, out of her hearing. Around Thanksgiving she and Pike rented an apartment in the building managed by the Adattos, and Ceniceros helped with the moving. Thereafter Ceniceros came to see Pike "quite a number of times," arriving during the afternoon; both men would leave for two or three hours in the evening, usually in Ceniceros' car; at no time would the men discuss any matters in the presence of Miss Sanchez. Between 5 and 6 p.m. on December 8, 1960, Ceniceros picked up Pike in Ceniceros' Chrysler and the two men drove off; Pike did not return.

The People then introduced evidence of two robberies committed by Pike on the evening of December 8, prior to the attempted robbery of the Lucky store: (1) Ann Bledstein testified that between 7:20 and 7:30 p. m. on that day Pike entered the shoe store owned

by her husband and herself, drew a gun similar to that later used to kill Officer Kent, and robbed them of the contents of the cash register and Mr. Bledstein's wallet; (2) Aaron L. Gordon testified that at about 7 p. m. on that same day Pike entered his men's store, drew a gun similar to that used to shoot Officer Kent, and robbed him of the contents of the cash register and his wallet.

The evidence as to Count II (armed robbery by Pike of Berta and Rudolph Fleischner) may be summarized as follows:[2] At approximately 6:45 p. m. on December 6, 1960, Pike entered Fleischner's variety store with a gun in his hand and directed Mr. Fleischner to empty the cash register. While the latter was complying, Mrs. Fleischner went to the front door and Pike ordered her to come back; when she did not move he held the gun to Mr. Fleischner's temple and said, "You want that I shoot your husband?" Pike then took Mr. Fleischner's wallet and ran out of the store. Mr. Fleischner pursued him, crying for help. Pike turned and fired his gun, then ran on. Mr. Fleischner returned to the store and found that he had been shot in the arm. After wounding Mr. Fleischner the bullet travelled through the window of a nearby laundromat and lodged in the neck of Janet Johnson (then Janet Crowell). The latter was treated and the bullet turned over to the police. A ballistics expert testified that it had been fired from the same gun that was used to kill officer Kent.

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[2]All of this testimony was limited to Pike, and the jury were so instructed.

Ceniceros took the witness stand in his own behalf. He admitted that he had known Pike for some 60 days prior to December 8, 1960; that he met Pike while the latter was living with Miss Sanchez; that he helped them move to their new apartment (i.e., in the apartment house managed by the Adattos); that shortly thereafter he accompanied Pike to Wiggin's garage while Pike left his car there for repairs; and that there were times when he drove Pike to various places in his own car, a blue Chrysler, and times when Pike borrowed the car and drove it alone.

With respect to the events of December 8, 1960, Ceniceros admitted calling for Pike at the latter's apartment between 5:30 and 5:45 p. m., and driving off with him in the Chrysler. He testified that they first went to Sy Devore's men's store, where Pike made a down payment on a coat for Ceniceros; that after 15 or 20 minutes in Sy Devore's Pike drove them to the corner of Sunset and Silverlake; that Pike then said that he "had something to attend to," and told Ceniceros that he would pick him up there again at 8 p. m. Ceniceros testified that he then walked a short distance to his mother-in-law's house, remaining there until 7:45 p. m., and was picked up by Pike at the appointed time and place; that Pike drove to 87th Street near Broadway (where the car was found after the shooting) and got out, saying that he "wanted to get a shirt." Ceniceros testified that he waited in the car; that some time later Pike ran up, jumped into the car with gun in hand, and told Ceniceros to get the car started; and that Ceniceros subse-

quently got out of the car at the command of Officer Poor.

On direct examination Ceniceros denied ever having been in the Lucky store, denied having "had any discussion with Mr. Pike about his going into that store and attempting to rob it," denied having any knowledge that Pike had done so, and denied having any "arrangement" with Pike whereby he, Ceniceros, was to "wait in the car for him while he committed a holdup." On cross-examination by the deputy district attorney, Ceniceros further denied having agreed with Pike to commit any other robberies and denied knowing of any that Pike had committed. He admitted, however, that Pike had given him a black star sapphire ring (People's Exhibit 69) two or three weeks before December 8; that he, Ceniceros, subsequently told several people that he had bought the ring; and that sometime in November he had the ring appraised in De Luca's jewelry store by Mr. De Luca. Ceniceros further denied having seen the envelope marked "Naomi" found on the rear floor of his car (People's Exhibit 67), but admitted that he looked in the back of his car from time to time and "would have noticed anything back there."[3] Ceniceros admitted having lied to Officer Poor in telling him that he did not know Pike, and also to Officer Chiquet in reiterating that assertion several hours later; he testified that he did so because he was "very frightened" and had "a horrible feeling."

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[3]The foregoing testimony relative to Ceniceros' contact with Mr. De Luca and People's Exhibits 67 and 69 was limited to Ceniceros.

Pike took the stand in his own behalf and testified on direct examination that he attempted to rob the Lucky store on December 8, that he shot Officer Kent during that attempted robbery, and that on December 6 he robbed the Fleischner variety store and shot at Mr. Fleischner as the latter pursued him after the robbery. Pike's description of these events was substantially similar to that of the various prosecution witnesses, the principal discrepancy being his testimony that Officer Kent had fired first. On cross-examination by counsel for Ceniceros, Pike corroborated his codefendent's story of the events of December 8 and the latter's denial of any agreement between them to engage in robberies. On cross-examination by the deputy district attorney, however, Pike admitted that he took the black star sapphire ring (People's Exhibit 69) in a robbery of the Rancho Park Jewelers on November 22, 1960, and gave it to Ceniceros a day or two later; and that the latter had the ring appraised and thereafter gave him the name and address of the De Luca jewelry store. Pike further admitted that the envelope marked "Naomi" (People's Exhibit 67) was among the items that he took in a robbery of the De Luca store on November 30, 1960; and that Ceniceros' car (where Exhibit 67 was found) was used by him in committing that robbery.[4]

Finally, Pike admitted that after his arrest on December 8 he told police officers that he had never seen Ceniceros prior to that night.

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[4]The foregoing testimony relative to the Rancho Park and De Luca robberies was limited to Pike.

The principal rebuttal evidence introduced by the People was the testimony of the victims of the just-mentioned Rancho Park and De Luca jewelry robberies, as follows:

(1) Elise Costanza, a saleswoman at the Rancho Park Jewelers, testified that on November 22, 1960, Pike entered the store, drew a gun, and ordered her to fill a white cloth sack with rings and watches from the display cases and with cash from the register. Finally he said, "That's enough. I don't have much time. My buddy's waiting for me." He herded the witness and several customers into a washroom and left by the back door. Miss Costanza further testified that one morning about a week or 10 days before the robbery Cenicceros entered the Rancho Park Jewelers and asked tc have his watch band repaired; that "just as soon as he gave me the watch, why, he went over to the diamond case where these rings were in and kept looking at them very intently. Then he turned and went to the opposite side of the store and near the—near the front end of the store, and was looking at our diamond pendants." Miss Costanza identified People's Exhibit 69, the black star sapphire ring, as one of the rings that Pike took during the robbery.

(2) Joseph C. De Luca, a jewelry store owner, testified that on November 30, 1960, Pike entered his store, drew a gun, and said, "Let's go back to where the safe is." The witness testified that Pike "seemed to know where it [i.e., the safe] was." Pike produced a white cloth sack and ordered Mr. De Luca to empty the contents of the safe into it. The victim complied

and, at the further direction of Pike, also handed over a tray of rings from a display case. Pike, with the booty, left by the back door.

The witness further testified that on November 28, two days before the robbery, Ceniceros entered his store with another man (not Pike) and said he wanted to trade a ring for a diamond. The ring was the black star sapphire taken in the Rancho Park robbery a week earlier. Mr. De Luca showed Ceniceros several diamonds from a display case and from his safe, but Ceniceros insisted that he wanted a still bigger one, and Mr. De Luca told him to return in a few days. Ceniceros explained to Mr. De Luca that he wanted the diamond ring for his girl friend and that he was planning on getting married.[5] Either the next day or the day of the robbery Ceniceros returned to the store about 4 p. m. He remained in the front of the store and looked in a few of the display cases while Mr. De Luca was waiting on customers, then waved and walked out without saying anything. Mr. De Luca further testified that amongst the merchandise taken during the robbery was a quantity of jeweler's "findings" or ear clips such as were found in Ceniceros' car after the shooting (People's Exhibit 67), and that such findings were kept in envelopes bearing the name of a firm called "Naomi."

Ceniceros' Motion for Severance. At the outset Ceniceros contends that he was deprived of a fair trial by reason of the denial of his motion to strike Count

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[5]Ceniceros had been married since the previous May.

II of the information (the Fleischner robbery) or, in the alternative, to grant a severance. The argument is that there was no showing that Ceniceros had any connection with the offense charged in Count II, and hence that the admission of evidence establishing the commission of that offense was prejudicial error as to him.

The contention is without merit. Section 954 of the Penal Code permits joinder of "two or more different offenses connected together in their commission. . . ." Such joinder is proper if there is "a common element of substantial importance" in the commission of the offenses. (*People v. Kemp* (1961) 55 Cal.2d 458, 475 [11] [11 Cal.Rptr. 361, 359 P.2d 913]; accord, *People v. Spates* (1959) 53 Cal.2d 33, 36 [3] [346 P.2d 5]; *People v. Chessman* (1959) 52 Cal.2d 467, 492 [12, 13] [341 P.2d 679].) Here it appeared that the gun with which Pike committed the armed robbery of the Fleischner store on December 6 (Count II) and with which he wounded Mr. Fleischner and Mrs. Johnson during that robbery, was the gun with which he shot and killed Officer Kent during the attempted armed robbery of the Lucky store on December 8 (Count I). Where an accusatory pleading charges separate offenses each involving the use of the same gun in their commission, the joinder has been held to be proper under section 954. *People v. Scott* (1944) 24 Cal.2d 774, 778-779 [5] [151 P.2d 517]; *People v. Walker* (1952) 112 Cal.App.2d 462, 471 [4] [246 P.2d 1009].) Section 1098 of the Penal Code provides for the joint trial of "two or more defendants . . . jointly charged

with any public offiense . . . unless the court order separate trials." Ceniceros was jointly charged with Pike in Count I; and the fact that he was not also charged with the robbery alleged in Count II "does not render the joinder improper or deprive the Court of discretion to deny a motion for severance since there is a joint charge as to one of the crimes and a common element of substantial importance in the commission of all of them." *(People v. Chapman* (1959) 52 Cal. 2d 95, 97 [1] [338 P.2d 428], and cases there cited.) No abuse of discretion is shown in the denial of Ceniceros' motion for severance.[6]

Nor is prejudice shown to have resulted to Ceniceros by admission of the evidence relative to Count II. Ceniceros simply states that he "was prejudiced" by such evidence, but "A bald assertion of prejudice is not enough." *(People v. Kemp* (1961, *supra,* 55 Cal. 2d 458, 477 [14].) Here the jury were repeatedly admonished to consider the subject evidence only with respect to the offense charged against Pike in Count II *(ante,* fn. 2) and in the absence of a strong showing to the contrary it is to be presumed that such instructions sufficiently protected Ceniceros' right to a fair trial. *People v. Santo* (1954) 43 Cal. 2d 319, 332 [19] [273 P.2d 249].)

Voir Dire Examination of Prospective Jurors. Both defendants contend that the *voir dire* examination was conducted by the deputy district attorney in such a manner that the jurors selected "felt that they were

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[6]*People v. Davis* (1940) 42 Cal.App.2d 70 [108 P.2d 85], relied on by Ceniceros, is distinguishable for the foregoing reasons.

committed to a death penalty." Defendants concede that "a prosecutor in a case where the death penalty may be imposed clearly has the right to ascertain the views of the potential jurors [citations] so that he can intelligently exercise his challenges against those whose consciences would preclude them from imposing this penalty. [Citations.]" (*People v. Wein* (1958) 50 Cal.2d 383, 394 [1] [326 P.2d 457].) Defendants argue, however, that in the case at bench the prosecutor abused this right and thus deprived them of a fair trial.[7]

The record does not bear out this assertion. A representative sample of the subject *voir dire* examination is set forth in the footnote.[8] From statements and

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[7]Since Ceniceros was not given the death penalty his standing to complain of the conduct of the deputy district attorney in this connection is questionable at best.

[8]In addressing the entire panel of prospective jurors the deputy district attorney stated that "I attempt by these questions to have them [i.e., the jurors] look forward several weeks when they are faced with it. Beause it is one thing to hear me ask questions here now and another to two or three weeks hence be under the gun and called upon when I may safely say, if it gets to that stage, I will urge on the evidence, what I believe the proper penalty. . . . I try to make you look forward to what you can expect me to urge based upon the evidence, giving consideration to all of the things I have mentioned: background and history, evidence in mitigation and aggravation, and circumstances surrounding the offense.

"Now, when I question you here, I am trying to make you look forward several weeks, that's all I am trying to do. I know you have all said you are not opposed to capital punishment. But if anyone during my questioning here or afterwards, if counsel questions other jurors, if you feel otherwise, or feel that you do not want to participate in such a verdict, I expect you to let me know by raising your hand, because I say through experience that jurors have on occasion stated they are not opposed to capital punishment in a proper case, but that they themselves did not

questions such as these the prospective jurors could not reasonably have concluded that they were in any way "committed" to imposing the death penalty. The deputy district attorney simply made it clear by such language that although each prospective juror had declared himself to be not opposed to capital punishment in theory, each should also consider whether he could bear the responsibility of actually condemning the defendants to death in the event that, in the exercise of his absolute discretion as a juror and on all of the evidence introduced at the penalty phase, he were to conclude that the proper penalty was death. Such a realistic line of inquiry falls well within the scope of the prosecutor's discretion in conducting his *voir dire* examination. Defense counsel is, of course, en-

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wish to participate in the return of such a verdict with other jurors."

Typical of the questions asked on *voir dire* in this connection is the following:

"Mr. Leavy: [deputy district attorney]: And did you feel I pretty well declared myself on behalf of the prosecution here as the deputy district attorney representing the People of the State of California as to what position I would take, based upon the evidence, if and when the occasion arose, and you sat as a juror concerning the penalty? Mr. Pittenger [a prospective juror]: Yes, sir.

"Mr. Leavy: You don't feel I was in any way equivocal in what position I said I felt would make [*sic*], did you? Mr. Pittenger: Not in my opinion. . . .

"Mr. Leavy: Very well. And you feel that you, too, would be willing to return with eleven other jurors if it was a proper case, all the evidence you had heard? Mr. Pittenger: Yes, sir.

"Mr. Leavy: And in your sound judgment, and discretion, that the proper penalty was the penalty of death as to either or both defendants, you would be willing to return it to this courtroom, and with eleven other jurors tell the defendants they are condemned, under the law of the State of California, to death? You would be willing to accept that responsibility? Mr. Pittenger: Yes, sir."

titled to equal scope in ascertaining that prospective jurors can serve with like fairness to the defendant. As we said in *People v. Hughes* (1961) 57 Cal. 2d 89, 94-95 [1-3] [17 Cal.Rptr. 617, 367 P.2d 33], "It is clear . . . that counsel for a defendant in a capital case has the right to question the prospective jurors on *voir dire* for the purpose of ascertaining whether any would vote to impose the death penalty without regard to the evidence in the event of a conviction. While a challenge on that ground is not specifically provided for in section 1074 of the Penal Code (implied bias), section 1073 permits a challenge for actual bias 'For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, . . .' The entertaining of an immutably established opinion in favor of invariably selecting the death penalty in any case where the offense charged is punishable at the discretion of the jury either by death or imprisonment is such a 'state of mind . . . which will prevent [the juror] from acting with entire impartiality and without prejudice, . . .'" Penal Code section 1074 provides that "If the offense charged be punishable with death" a challenge for bias may be taken as to a prospective juror for "the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror." Here defense counsel had previously questioned the prospective jurors with a view to determining the ability of each to vote for life im-

prisonment rather than the death penalty if the evidence should warrant the lesser punishment, and the prosecutor appears merely to have performed his duty to ascertain that prospective jurors were not disqualified within the purview of section 1074.

Pike further complains that the deputy district attorney in effect committed each juror to violate his sworn duty to express his individual conviction in determining the penalty. But it is apparent that the deputy's reference to "participating" with eleven other jurors in a verdict of death was merely a manner of phrasing intended to emphasize the potential responsibility involved, and it would be unreasonable to assume that the jurors understood it otherwise. As obviating any such possibility, we further observe that the jury were specifically instructed on the penalty phase that "Your verdict must express the individual opinion of each juror."

Pike also argues that in making the above-quoted statements the deputy was expressing his personal opinion as to the proper penalty based upon evidence not produced in court, and that this is improper under such cases as *People v. Love* (1961) 56 Cal.2d 720, 730 [19] [16 Cal. Rptr. 777, 17 Cal. Rptr. 481, 366 P.2d 33, 809], and *People v. Kirkes* (1952) 39 Cal. 2d 719, 723 [1] [249 P.2d 1]. But those (and other similar) decisions are not relevant, as each deals with expressions of opinion voiced by the prosecutor, during closing argument on the guilt or penalty phase —i.e., after all of the evidence was in. Here the prosecutor simply told the prospective jurors, as a preface

to his above described line of inquiry, that on the basis of what he anticipated the evidence yet to be presented would show, he expected to ask for the death penalty should the trial reach that stage. Such a forthright disclosure is commendable rather than improper.

Finally, it is observed that neither defendant made timely objection to the subject statements and questions of the deputy district attorney, and hence they "cannot now complain for the first time as, upon objection, any danger that the jury might have misunderstood their duty could have been corrected by proper instructions." *(People v. Wein* (1958), *supra,* 50 Cal. 2d 383, 395 [4].)

Failure to Charge a Conspiracy. Ceniceros complains that he was denied a fair trial in that, while no conspiracy was charged in the information, evidence was admitted against him of offenses, acts, and statements by Pike under the theory that he and Pike conspired to commit a series of robberies which culminated in the crimes of December 8, 1960. In these circumstances, however, a conspiracy need not be pleaded in the indictment or information if the evidence actually shows the existence of one. *(People v. Ditson* (1962) 57 Cal. 2d 415, 447 [22] [20 Cal. Rptr. 165, 369 P.2d 714]; *People v. Davis* (1957) 48 Cal.2d 241, 250 [11] [309 P.2d 1]; *People v. Tanner* (1935) 3 Cal.2d 279, 299 [7] [44 P.2d 324]; *People v. Wells* (1960) 187 Cal.App.2d 324, 329-330 [12] [9 Cal.Rptr. 384].) On the evidence hereinabove summarized, implicating Ceniceros in the planning and execution of the various robberies carried out by Pike,

the jury could reasonably have inferred the existence of a conspiracy between these defendants to commit the crimes with which they are charged. (Pen. Code, § 31.)

Nor is any element of surprise or unfairness shown to have resulted from the People's election to refrain from adding a separate count charging the crime of criminal conspiracy. Ceniceros was well aware, before going to trial, that the case against him was based on theories of conspiracy and aiding and abetting. At the preliminary examination the prosecution introduced evidence tending to establish the principal facts hereinabove summarized; at the same time Ceniceros was held to answer to a complaint charging him and Pike with commission of the Rancho Park and De Luca robberies;[9] and in opposing Ceniceros' motion for severance at the start of trial in the case at bench the deputy district attorney left no doubt that he would "ask this Court to apply the law of conspiracy to prove that the murder which they are on trial for was the result of the conspiracy that they had entered into to commit robberies."[10]

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[9]In a companion case Pike was held to answer to a complaint charging him with commission of the Bledstein and Gordon robberies. Both of the latter cases (L.A. 237706 and L.A. 237709) were ordered off calendar on August 10, 1961, pending the determination of the present appeal.

[10]The jury were instructed that "the defendants . . . are not charged in the Information in any count with the offense of conspiracy. However, the prosecution has offered evidence as part of its case in an attempt to prove and for the purpose of showing that the defendants . . . were acting in concert and in furtherance of a conspiracy to commit a series of criminal acts, to wit, robberies. For this reason the Court will give you instructions concerning the law of conspiracy."

Evidence of Other Offenses as Part of the People's Case in Chief. Pike contends that the court erred in allowing the People to introduce, as part of their case in chief, evidence that he committed the Bledstein and Gordon robberies. He complains that the latter offenses were not charged in the information, and hence that the admission of evidence relating thereto deprived him of a fair trial. The subject evidence, however, was not offered to show a general criminal disposition, but to establish that armed robberies were committed by Pike while the two defendants were together in Ceniceros' car, shortly before the attempted armed robbery of the Lucky store and the shooting of Officer Kent. The evidence "tends logically and by reasonable inference" to establish that fact (*People v. Riser* (1956) 47 Cal.2d 566, 578 [10] [305 P.2d 1]), and hence was admissible to show the common design of the criminal enterprise undertaken by the defendants. (*People v. Calhoun* (1958) 50 Cal.2d 137, 144 [10] [323 P.2d 427]; *People v. Carter* (1961) 192 Cal. App.2d 648, 660 [7a-7b] [13 Cal.Rptr. 541]; *People v. Bompensiero* (1956) 142 Cal.App.2d 693, 707-708 [6] [299 P.2d 725].) The jury were adequately instructed in this regard (CALJIC No. 33).

Scope of Cross-Examination. Both defendants contend that the court erred in allowing the deputy district attorney to cross-examine Ceniceros with respect to the latter's knowledge of and contact with the Rancho Park and De Luca stores during the month of November 1960, and his knowledge of and contact with People's Exhibits 69 (the black star sapphire

ring) and 67 (the ear clips).[11] It is urged that the cross-examination was improper because insufficiently related to matters brought out on direct examination of Ceniceros.

The contention is without merit. Section 1323 of the Penal Code provides in relevant part that if a defendant "offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." As we explained, however, in *People v. Zerillo* (1950) 36 Cal. 2d 222, 228 [4]-229 [7] [223 P.2d 223], "This does not mean that the cross-examination must be confined to a mere categorical review of the matters, dates or times mentioned in the direct examination. [Citations.] It may be directed to the eliciting of any matter which may tend to overcome or qualify the effect of the testimony given by him on direct examination. [Citations.] . . . If a defendant takes the stand and makes a general denial of the crime with which he is charged the permissible scope of cross-examination is very wide. [Citations.] Moreover, as stated in *People v. Teshara*, 141 Cal. 633, 638 [75 P. 338], 'A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-exam-

[11]As the subject testimony was expressly limited to Ceniceros (*ante*, fn. 3), Pike cannot complain of any alleged impropriety therein.

ined with respect to facts or denials which are necessarily implied from the testimony in chief, as well as with respect to facts which he expressly states.'" (Accord, *People v. Weiss* (1958) 50 Cal.2d 535, 561 [16] [327 P.2d 527]; *People v. Watson* (1956) 46 Cal. 2d 818, 832 [9] [299 P.2d 243].)

Tested by these rules, the subject cross-examination was proper. Ceniceros took the stand and made "a general denial of the crime with which he is charged." Moreover, as noted above, on direct examination he specifically testified (1) that he had never been in the Lucky store managed by Jess Arriola; (2) that he had never had any discussion with Pike concerning an attempt to rob it; (3) that if in fact Pike did attempt to rob the store he knew nothing about it; and (4) that he had no arrangement with Pike whereby he, Ceniceros, was to wait in the car for Pike while the latter carried out the robbery. The clear impact of this testimony was to assert that the defendants' association was and had at all times been a wholly innocent one. It was therefore not improper to allow the prosecutor to question Ceniceros with respect to the latter's knowledge of and connection with the other offenses committed by Pike, as such inquiry tended to overcome or qualify the effect of Ceniceros' testimony on direct examination. (See also *People v. Tarantina* (1955) 45 Cal.2d 590, 599 [12] [290 P.2d 505]; *People v. Henderson* (1956) 144 Cal.App.2d 706, 711 [2] [301 P.2d 468], and cases there cited.)

Ceniceros further complains of cross-examination relating to a handcuff key which was part of People's

Exhibit 61, a ring of keys found in his car after his arrest. Ceniceros acknowledged that the handcuff key was his, but explained that he had found it and kept it as a novelty piece. The matter was not pursued. Since the key was found in Ceniceros' car, which figured prominently in the case, it was not improper under the circumstances to inquire briefly into its origin and purpose.

Pike complains of cross-examination relating to his knowledge of the origin of People's Exhibit 67 (the ear clips). The objection to that inquiry apparently was intended to include all cross-examination of Pike relating to the Rancho Park and De Luca robberies. Previously, however, Pike had testified on cross-examination by Ceniceros and had corroborated the latter's story in every material respect. For the reasons given above, the People's cross-examination of Pike with respect to the circumstances surrounding the Rancho Park and De Luca robberies was not improper as it tended to overcome or qualify the implication of innocent association suggested by the just-mentioned testimony.

Evidence of Other Offenses in Rebuttal. Defendants contend that the court erred in allowing the People to introduce as rebuttal evidence the testimony of the victims of the Rancho Park and De Luca robberies. The argument is that if evidence of the latter robberies was admissible at all, it was properly part of the People's case in chief rather than rebuttal; and hence that under the rule of *People v. Carter* (1957) 48 Cal. 2d 737, 753 [16]-754 [19] [312 P.2d 665], the admis-

sion of such evidence after the defense had rested was error and deprived defendants of a fair trial.

This contention is closely related to the preceding point, and is equally without merit. The factual complexion of the case before us is materially different from that of the *Carter* case. In *Carter* a red cap, found in a slough with the murder victim's empty wallet and a wrench owned by the defendant, was introduced in rebuttal and connected to the defendant by means of a microscopic examination of hair. We were of the opinion (*id.* at p. 754 [19] of 48 Cal.2d) that the cap should have been put in as part of the People's case in chief because it was "crucial evidence tending to show that defendant had put the wallet and wrench in the slough and therefore had beaten and robbed [the victim]." In the case at bench the evidence of the Rancho Park and De Luca robberies was not "crucial" nor was it directly probative of the crimes charged. The deputy district attorney introduced a substantial mass of testimony and exhibits as his case in chief in support of his announced theories of conspiracy and aiding and abetting; he was not required, in exercising his right to control the conduct of the prosecution, to introduce the subject evidence as well. In the course of the above discussed cross-examinations, however, both Ceniceros and Pike testified that there had never been any agreements between them to commit any unlawful acts whatever. The deputy district attorney was not bound to accept these self-serving and exculpatory assertions at their face value but could properly introduce the subject evidence for the specific purpose of impeachment.

(*People v. Wein* (1958), *supra,* 50 Cal.2d 383, 407 [35]; *People v. Westek* (1948) 31 Cal.2d 469, 476 [5]-478 [6] [190 P.2d 9]; *People v. Hoffman* (1926) 199 Cal. 155, 162 [6] [248 P. 504].) This being so, it is immaterial that the impeaching evidence also tended—as by its nature such evidence often does—to support the People's case in chief (*People v. Mayfield* (1961) 196 Cal.App.2d 72, 75 [4] [16 Cal.Rptr. 261]; *People v. Mackey* (1959) 171 Cal.App.2d 513, 516-517 [1] [340 P.2d 688]; cf. *People v. Nye* (1951) 38 Cal.2d 34, 39 [5] [237 P.2d 1]), or that it tended to connect the defendants with crimes (the Rancho Park and De Luca robberies) other than those for which they were on trial (*People v. Atkins* (1958) 163 Cal.App.2d 732, 737 [4] [329 P.2d 939]; *People v. Jackson* (1957) 152 Cal.App.2d 397, 404-405 [6] [313 P.2d 931], and cases there cited).[12]

Nor does it appear that the admission of the subject evidence in this particular order deprived defendants of a fair trial. The order of proof rests largely within the discretion of the trial court. (Pen. Code, §§ 1093, subd. 4, 1094; Code Civ. Proc., § 2042; *People v. Wein* (1958), *supra,* 50 Cal.2d 383, 407 [36]; *People v. Carter* (1957), *supra,* 48 Cal.2d 737, 754 [20].) The contention here discussed was raised by appropriate objections and motions to strike and to declare a mistrial, and was argued at considerable length before the trial court. In making its ruling the court stated, "Now, I have carefully studied the motions, the argu-

[12]On the latter point it will be remembered that during cross-examination Pike had judicially confessed to committing both the Rancho Park and De Luca robberies.

ments, the evidence and the legal authorities for all of yesterday, last night and early this morning. . . . It is my best judgment that so far the trial has not been unfair to either the defendant Pike or the defendant Ceniceros, that the motions should be denied, and that is the ruling of the Court." Defendants fail to show that this careful and deliberate disposition of the matter amounted to an abuse of the court's discretion.

Introduction of Documentary Evidence of Pike's Prior Conviction. As noted earlier, both defendants were charged in the information with prior felony convictions, and both admitted the priors at the start of trial and out of the presence of the jury. Pike contends that the court erred in allowing the deputy district attorney, at the close of his cross-examination, to introduce documentary evidence of Pike's prior conviction (attempted robbery in Minnesota) without first asking him whether he had been convicted of a felony.

The contention is unavailing. Section 2051 of the Code of Civil Procedure provides, with respect to impeachment by proof of prior conviction, that "it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony. . . ." A defendant who chooses to take the witness stand in a criminal action thereby subjects himself to impeachment in the same manner as any other witness, including impeachment by proof of a prior felony conviction. The rule is not different where the defendant has admitted the prior conviction

out of the presence of the jury in pleading to the indictment or information, notwithstanding the provisions of section 1025 of the Penal Code.[13] (See, e.g., *People v. Jackson* (1959) 53 Cal.2d 89, 93 [3] [346 P.2d 389]; *People v. Cobb* (1955) 45 Cal.2d 158, 162-163 [8] [287 P.2d 752]; *People v. Garcia* (1959) 174 Cal.App.2d 525, 532-533 [11] [344 P.2d 855].) It has been said that "The usual manner of making proof of a prior conviction is to ask the witness who has suffered such a conviction if he has been theretofore convicted of a felony, and if he denies that he has been so convicted, to produce a copy of the judgment of conviction; or if he answers in the affirmative he may then be asked of what specific crime he was convicted." (*People v. Craig* (1925) 196 Cal. 19, 28 [5] [235 P. 721].) Here that more ordinary practice was not followed, but the course taken was not in violation of any rule of evidence. There is no statutory directive as to selection of procedure in this respect; section 2051 simply designates alternative means of proof. In any event, at the time of the admission of the documentary proof of the prior conviction Pike had already made his detailed judicial confession of guilt of the crimes for which he was on trial, and hence could not possibly have been injured by the ruling.[14]

Evidence of Another Offense on the Penalty Phase. Pike next complains that the court erred in allowing

[13]Penal Code section 1025 provides in relevant part that "In case the defendant pleads not guilty, and answers [in pleading to a charged prior conviction] that he has suffered the previous conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial."

[14]The evidence of the prior conviction, of course, was admissible on the penalty phase.

the People to introduce evidence of the commission by Pike of the offense of pimping, after he had rested his case on the penalty phase. Pike argues that the offense does not involve violence and hence was irrelevant to any issue on the penalty phase; and that in any event the evidence establishing it was properly part of the prosecution's case in chief rather than rebuttal.

The argument is untenable. During the taking of evidence on the penalty phase Pike called to the witness stand several members of his family who testified that he had been "very close" to his father, that his father had had heart trouble and had died in June 1960, that Pike "was hurt very badly" by his father's death, that he seemed different thereafter and was "very moody." The impact of this and similar testimony was to explain Pike's criminal propensities as being an outgrowth of a personality change brought about by his grief over his father's death. The evidence offered by the People tended to rebut that implication by showing that Pike was involved in criminal undertakings as early as May 22, 1960 (the date of his arrest on a charge of pimping), i.e., even while his father was suffering from a serious heart condition. Such evidence was relevant to the issue of the "background and history" of the defendant (Pen. Code, § 190.1), and hence was proper rebuttal under the authorities cited hereinabove.

Argument on the Penalty Phase. Pike contends that in three instances the deputy district attorney referred in argument on the penalty phase to facts not in evidence.

First, Pike points to a reference in argument to the death penalty's being a deterrent and to the fact that some criminals carry toy or unloaded guns through fear of incurring that penalty. This language, it is urged, brings the case within the holding of *People v. Love* (1961) 56 Cal.2d 720, 732 [23a] [17 Cal.Rptr. 481, 366 P.2d 33, 809].[15] Examination of the transcript, however, reveals that in making the subject remarks the deputy was replying to matters first raised by defense counsel, who had stated at length their personal opinions and the asserted opinions of various other persons to the effect that the death penalty was not truly a deterrent.[16] More importantly,

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[15]It is noted that the argument on the penalty phase in the case at bench took place on July 19 and 20, 1961, and that the decision in *People v. Love, supra,* was filed on November 2, 1961.

[16]Counsel for Pike, for example, argued to the jury that "none of you, I am sure, would want to execute a man just for the sake of executing him, if any good could come out of the execution of this man, if it were a deterrent to others, it might be worth it. Yes, that is what I am saying, it might be worth it. But the facts have shown in the past, ladies and gentlemen, that the execution of this man, as well as the execution of many other men, does not deter killings in the future. As a matter of fact, evidence shows that as violence increases, the greater the number of people are executed, the more crime breaks out." Counsel then proceeded to quote several passages from a writing by one Albert Camus assertedly demonstrating that the death penalty is not a deterrent, and commented, "How true that is. If this would deter, there I have cited cases to you of men that have been killed in the gas chamber for slaying police officers, for other reasons. And yet we pick up our daily papers, and there is almost a murder of the day splashed across the front pages, more police officers than ever, more husbands and wives, more vicious slayings of all kinds. And we are killing, we are executing, the gas chamber is working harder and harder than ever. And the forces keep going harder and harder the other way."

Similarly, counsel for Cenicceros quoted from a writing purportedly authored by Warden Lawes wherein the view is advanced that capital punishment is not a deterrent.

the transcript also reveals that the deputy made it clear to the jury that he was not asking for the death penalty because he thought it was a deterrent to others but because he believed that the evidence fully warranted it in the present case.[17] The major portion of his argument was then devoted to analyzing that evidence in the customary manner. It follows that his reference to the deterrent effect of the death penalty was at most a minor part of his argument and must

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[17]Thus, the deputy stated in part that "Mr. Kidney [counsel for Pike] and Mr. Parsons [counsel for Ceniceros] have argued to you about deterrents for crime. They attempted to argue to you that capital punishment is not a deterrent; we still have homicide.

"My approach to this problem of what is a proper penalty in a case such as this is a little different than some of the people who speak or write upon it. Maybe it is through my experience. But I have had my share of it. I never ask a jury—first of all, I am not allowed to, but I wouldn't—I never ask a jury to impose capital punishment on a defendant to deter others, to warn others. I never do that. The law doesn't allow me to do it, and you shouldn't do it, and I don't ask you to do it in this case. It wouldn't be fair. Because I am sure the other fellows who go out and commit murder may never have heard of Pike and Ceniceros, and what penalty you impose. . . .

"I call those things to your attention because I have leveled with you folks from the beginning. I told you I had taken a position. You know what the evidence is now. I told you that the evidence is even more forceful than I anticipated, and I still maintain the same position. I don't ask you to impose capital punishment for a deterrent. I ask you as the law now permits, since September of 1957, looking at the background and history of these men, the circumstances under which this offense was committed, the fact that they were in a scheme and plan and went in with their eyes open, putting guns on people, shooting at two people in two instances that we know of, fully aware what each other—not an impulsive thing cooked up in a bar, 'Okay, Charley, let's go out and commit a robbery.' A thing that has been going on between these men, who have had a chance to discuss, who made several successful robberies, took the loot of it, in some way split it, but you have men on background and history, circumstances of the offense, all things considered, as I have told you."

be deemed nonprejudicial under article VI, section 4½ of our Constitution. (*People v. Imbler* (1962) 57 Cal.2d 711; 717-718 [10] [21 Cal.Rptr. 568, 371 P.2d 304]; *People v. Garner* (1961) 57 Cal.2d 135, 156 [23] [18 Cal.Rptr. 40, 367 P.2d 680]; *People v. Lane* (1961) 56 Cal.2d 773, 787 [16] [16 Cal.Rptr. 801, 366 P.2d 57].)

The second alleged instance of improper argument by the deputy district attorney is the following remark: "Mr. Kidney [deputy public defender, representing Pike] gave you the story about the guillotine, some reaction by someone who had witnessed it. I don't know whether he is trying to frighten you or not. But I again remind you that Pike at 10:45 or 11:00 o'clock the night of December 8th, after he knew he had killed Richard Kent, Pike had normal blood pressure.[18] I don't think there is a single person on the jury who would have had normal blood pressure many hours after you might have unfortunately, with your own automobile, accidentally run down a pedestrian, even if it was the pedestrian's own fault." The remark, however, was prompted by the above mentioned argument of Pike's counsel drawn from a writing by one Albert Camus (*ante*, fn. 16). The deputy immediately explained that "I just point out those things to emphasize the kind of people you are dealing with here, all things considered, the circumstances of the offense, their background and history." The mat-

[18]Dr. Mandell, who examined Pike between 10:21 and 11:41 p.m. on the night of the killing, had testified that his blood pressure was normal at that time.

ter was not pursued. Moreover, no objection was interposed by either defendant, and the jury were properly instructed that statements of counsel concerning the facts must not be regarded as evidence.

The third and final alleged instance of impropriety in argument is predicated on the deputy district attorney's remark to the effect that it is the duty of defense counsel, "regardless of what they think of their client's testimony, to do the best they can with it," and that a lawyer in a criminal case could ethically allow (but could not advise) his client to testify falsely. The first part of that remark is a correct statement of the law when made, as it was here, in explanation of section 6068, subdivision (e), of the Business and Professions Code[19]. (*In re Atchley* (1957) 48 Cal.2d 408, 418 [3] [310 P.2d 15]; *People v. Davis* (1957) 48 Cal.2d 241, 256-257 [21] [309 P.2d 1]); but it is manifestly incorrect, indeed, repugnant to the duty declared, to infer therefrom that counsel may knowingly allow[20] a witness to testify falsely, whether he be a criminal defendant or otherwise (Bus. & Prof. Code, § 6068, subd. (d); *People v. Davis*

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[19]Business and Professions Code section 6068 provides in relevant part:

"Duties as an attorney. It is the duty of an attorney: . . .

"(e) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense; . . ."

[20]It is to be remembered that a person cannot accurately be said to "allow" that which he cannot prevent. (*People v. Forbath* (1935) 5 Cal.App.2d Supp. 767, 769-771 [1, 2, 3] [42 P.2d 108]; *Brodsky v. California State Board of Pharmacy* (1959) 173 Cal. App.2d 680, 686 [3] [344 P.2d 68].)

(1957), *supra,* at p. 257 [23] of 48 Cal.2d). The remark is not to be condoned but, as affecting the issue before us, we are bound to note that it was made in response to the equally erroneous statement by the deputy public defender (counsel for Pike) that "I would resign my office first [rather] than do such a thing, I would never ask that a man's life be pardoned [i.e., spared by the jury] if I thought for a moment that he was a death penalty matter." When the latter statement was made the deputy district attorney interposed the following objection: "Now, I don't think that's quite a correct statement of the law. I am not going to call attention to it at this time, if the Court please, but I do want to understand that I have a chance to reply to this." The court granted him permission to do so, and it is apparent from the context of this exchange that the jury could not reasonably have understood the subject remarks to constitute anything but a general discussion, apart from the merits of the present case, of what the deputy public defender and the deputy district attorney conceived were the duties of a defense counsel. The discussion was not protracted; and while any erroneous statement of law contained therein (none of which, it bears emphasis, related to the duties of the jury) could easily have been corrected by prompt instruction, no request for such an instruction was made by either defendant. In the circumstances the point is without merit. (See *People v. Wein* (1958), *supra,* 50 Cal.2d 383, 396 [8-9]; *People v. Sampsell* (1950) 34 Cal.2d 757, 763 [2]-765 [3] [214 P.2d 813].)

For the reasons above stated the judgments and orders appealed from are affirmed.

Schauer, J.

Gibson, C. J., Traynor, J., McComb, J., Peters, J., and White, J., concurred.

Filed June 27, 1962,
William I. Sullivan, Clerk.

Appellants' petition for a rehearing was denied July 27, 1962.